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In the

Supreme Court of the United States

October Term, 1958

No. [redacted] 106

MONT B. KISER, ET AL.,

Appellants,

v.

CLINCHFIELD COAL CORPORATION,

Appellee.

MOTION OF APPELLEE TO DISMISS APPEAL

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record for Appellee

THOS. C. PHILLIPS
188 East Main Street
Abingdon, Virginia
Of Counsel

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May it please the Court:

The appellee hereby moves the Court to dismiss this appeal upon the grounds that (1) it does not present a substantial federal question; (2) the two alleged federal questions sought to be reviewed were not timely and properly raised and were not expressly passed upon; (3) the judgment rests upon an adequate non-federal basis.

1.

No Substantial Federal Question Is Presented

Appellants rested their claim of fee simple title to the 117-acre tract in question upon an unrecorded deed to Schofield Kiser made by James M. Kiser on January 31, 1884, or, alternatively, upon title by adverse possession on

the part of said Schofield Kiser. Both Virginia courts, by applying established principles of Virginia real property law to the facts as found by them, held against appellants on both points.

They held that appellee, claiming title to the mineral estate, was a bona fide purchaser thereof for value and without notice, and as such had good title thereto (J. S. 31, 43).* They found as a fact that appellee in 1907 purchased the mineral estate in a 1400-acre tract, including the 117-acre tract, in reliance upon a good recorded chain of title thereto, commencing with a deed made by said James M. Kiser, the common source, to Tazewell Coal and Iron Company on December 7, 1887 (J. S. 31, 33, 43).

With respect to appellants' claim of title by adverse possession, they found as a fact that Schofield's adverse possession of the surface ended in 1891 (J. S. 30, 41) (within the 10-year period necessary to ripen title—J. S. 5), and that he never held any "occupancy or use of any part of the mineral estate such as would constitute actual possession" (J. S. 33, 54-5). Both courts found as a fact that appellee "has exercised acts of exclusive ownership" of the mineral estate (J. S. 33, 57). The "acts of exclusive ownership" consisted of extensive coal mining operations conducted by appellee for a period of years on the James M. Kiser mineral tract, including the 117-acre tract (operations shown on Exhibit "Map B"). Appellants' allegations (J. S. 5, 6, 10, 11 *et seq.*) as to the length and character of Schofield's possession evidently will not bear comparison with the courts' findings of fact hereinbefore cited.

With respect to appellants' claim of title to the surface,

* Numerals in parenthesis with the letters "J. S." are page references to the Jurisdictional Statement.

both courts found as a fact that Schofield's adverse possession ended in 1891, as hereinbefore mentioned. This finding eliminated any area of applicability of the Virginia statute relative to title by adverse possession (J. S. 5). The courts decided that appellee holds good title to an undivided two-fifths (2/5) interest in the surface by recorded chain of title from James M. Kiser (J. S. 33, 35, 57, 60).

In 1887, under the rule in *Chapman* v. *Chapman*, 91 Va. 397, 21 S. E. 813, 50 A. S. R. 846, which was then Virginia case law, Schofield, by virtue of his possession then, had a good defense against Tazewell. Both Virginia courts so held (J. S. 30, 42). But in 1900 the Virginia statute defining constructive notice was amended (J. S. 3-4) so as to abrogate the rule in the *Chapman* case. Appellee, purchasing in 1907, after the abrogation, was held to have good title notwithstanding such possession of the surface as Schofield then had (by the curtesy).

Appellants somehow deem that the Virginia courts construed the 1900 amendment "retrospectively" so as to deprive appellants of "a vested property right" (J. S. 10). Obviously the statute was not applied retrospectively, but prospectively—not to *Tazewell's* purchase in 1887, but to *appellee's* in 1907. Appellants seem to suppose the contrary. But the Virginia court said: "Thus this proviso applied to all purchasers of the mineral estate *since the enactment of the statute* (emphasis supplied) abrogating the rule in the *Chapman* case, and mere possession by Schofield or Mont Kiser *since the effective date of the statute* (emphasis supplied) constituted no notice of Schofield's deed" (J. S. 31). The rule in the *Chapman* case evidently gave appellants no "vested right" to forbid the Virginia courts to apply *to a purchase made in 1907* the law then in effect and to consider the facts then existing.

Schofield had had ample opportunity to obtain a good record title during the period before innocent purchasers entered the situation, but he did not do so.

Neither Virginia court mentioned any federal question, and neither referred anywhere, directly or indirectly, to the Constitution of the United States or to any constitutional question.

2.

The Two Questions Sought To Be Reviewed Were Not Timely and Properly Raised and Were Not Expressly Passed Upon.

Appellants do not allege in their jurisdictional statement that in the trial court they raised either federal question in their pleadings (consisting of a demurrer and an answer of 16 pages). They allege that they contended in oral argument there that the statute "would be unconstitutional if applied as the court did" (J. S. 11), but do not claim to have referred in such argument to the Constitution of the United States. They allege that in a brief in the trial court they argued that the statute was "powerless to affect Schofield's rights which were vested and quoted from Mr. Justice Story's opinion while on Circuit" (J. S. 11), but again do not claim to have mentioned the Constitution of the United States. They allege that in their petition for appeal and in their brief in the Supreme Court of Appeals of Virginia they "reiterated the argument" (J. S. 11), but again they do not claim to have mentioned the Constitution of the United States.

These papers are not before this Court, none of them having been designated by appellants for certification as a part of the record here. However, in event the Court is of

opinion to consider appellants' allegations without record support that they raised the federal questions, then we, in that event, submit the following: We have examined the briefs and petition referred to, and find that (1) the argument referred to by appellants appears in the brief in the trial court on pages 41-44 of a 46-page brief, on pages 52-55 of a 63-page petition for appeal, and on pages 80-85 of a 92-page brief in the Supreme Court of Appeals, and is in identical language in all three papers; (2) nowhere in the argument is the Constitution of the United States mentioned or a "federal question" alleged, and only once is the word "Constitution" used, namely in the following passage:

"The best statement we have found of what retrospective laws are forbidden by the Constitution, is in the opinion of Mr. Justice Story while on Circuit in New Hampshire in the case of *Society, Etc.* v. *Wheeler*, 2 Gall. (U. S.) 139, Vol. 22, Fed. Cas. p. 756, Case No. 13156, where he said:

"'Every statute which takes away or impairs vested rights, acquired under existing laws, or creates new obligations, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.' See *McCracken* v. *Heywood*, 2 How. 608, 612"; (3) no federal authority other than in the above-quoted passage is referred to in the argument, although a number of Virginia decisions are cited; (4) nowhere in any of the papers referred to do we find any mention of or reference to appellants' supposed federal question numbered 2 (J. S. 5); (5) in appellants' above-mentioned brief in the Supreme Court of Appeals of Virginia on pages 2-4 under the heading "Assignments of Error", appears a list of nine assignments of alleged errors of the trial court, and on pages 4-6 of that brief under the heading "Questions Involved in This Appeal", appears a list of nine questions,

none of which, in either list, mention the Constitution of the United States, or either of the two questions here sought to be reviewed, or any alleged federal question.

Commenting now upon the above-mentioned results of our examination of these papers, we point out that appellants' argument as to "retrospective" construction and authorities there cited are equally as applicable to the Constitution of Virginia as to the Constitution of the United States, inasmuch as the Constitution of Virginia contains a due process of law clause (Art. 11: "no person shall be deprived of his property without due process of law . . .") and an impairment of the obligation of contracts clause (Art. 58: ". . . the General Assembly shall not pass . . . any law impairing the obligation of contracts . . ."). When, as here, the language raising the supposed federal constitutional question is equally apposite with respect to the state constitution, this Court has assumed that the question was raised under the state constitution and that no federal question was raised—". . . not as having reference to any repugnance to the Constitution of the United States." *Miller v. Cornwall R. Co.*, 168 U. S. 131, 18 S. Ct. 34, 35, 42 L. ed. 409.

With reference to the above-mentioned passage quoted by appellants from the *Society* case, it is evident that the passage would constitute pertinent authority in construing the Constitution of Virginia, even if Justice Story in the *Society* case was referring to the Constitution of the United States.

In further reference to appellants' supposed federal question No. 2, we point out that whereas by the notice of appeal appellants invoked the jurisdiction of this Court "pursuant to 2 (apparently intended for 28) U. S. C. Sec. 1257(2)",

yet question No. 2 is not within the ambit of that sub-section. Sub-section 2 does not confer jurisdiction by appeal in cases where, as in question No. 2, the validity of a State statute is *not* drawn in question "on the ground of its being repugnant to the Constitution . . . of the United States", and where as here, the State court did *not* pass upon the validity of such statute. Appellants, by their question No. 2, do not question the validity of the Virginia statute defining title by adverse possession (J. S. 5). As hereinabove pointed out, appellants did not anywhere raise in the Virginia courts any constitutional question with reference to this statute. The Virginia courts did not anywhere pass upon such constitutional question, and did not anywhere indicate that they considered such question.

Appellants further allege (J. S. 12) that "they made the same argument" on their question No. 1 in a petition for rehearing addressed to the Supreme Court of Appeals of Virginia, which was "refused without comment". Such petition for rehearing was not designated by appellants for certification as a part of the record here and is therefore not before the Court. If the allegations regarding the petition for rehearing are to be considered, this Court has held that it is too late to raise a federal question in a petition for rehearing. In *Herndon v. Georgia*, 295 U. S. 141, 55 S. Ct. 794, 59 L. ed. 1530, 1532, it was said: "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long established rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the Court actually entertains the question and decides it". Appellants admit that the Virginia court refused their petition "without comment".

Appellants further allege (J. S. 12): "Thus we have from the beginning insisted on the right secured them by the provisions of the Constitution of the United States . . ." Clearly, in view of the foregoing, this allegation is inaccurate.

Referring now to our ground that appellants' two questions were not expressly passed upon by the Virginia courts, we have pointed out hereinabove that these courts never anywhere considered the questions or recognized their existence, but based the decision wholly upon the real property laws of Virginia.

In view of the foregoing, we think it plainly appears that the two questions sought to be reviewed were not timely and properly raised and were not expressly passed upon.

3.

The Judgment Rests Upon an Adequate Non-Federal Basis

We pointed out hereinbefore under the first ground of this motion that both Virginia courts held that, under the real property laws of Virginia, appellee was a bona fide purchaser for value without notice and therefore had good title to the mineral estate of the 117-acre tract. The decision was based exclusively upon the facts found by the Virginia courts and the courts' application thereto of the Virginia real property laws. This provided an adequate non-federal basis for the decision.

RECEIPT OF JURISDICTIONAL STATEMENT

Appellants' Jurisdictional Statement served upon counsel for appellee was received on June 9, 1959.

WAIVER OF RIGHT TO FILE BRIEF

Appellee hereby waives its right to file a brief in support of this motion.

WM. A. STUART
188 East Main Street
Abingdon, Virginia
Counsel of Record for Appellee

THOS. C. PHILLIPS
188 East Main Street
Abingdon, Virginia
Of Counsel